IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
NOVEMBER 17, 2005 Session

HELEN SFIKAS ROGERS, Temporary Guardian for the Estate of Reuben K. Richards v. THE FIRST NATIONAL BANK , TERRY W. CHRISTIAN and wife, ZELDA E. CHRISTIAN, and MARYILY CUNNINGHAM

Direct Appeal from the Chancery Court for Hickman County
No. 03-144C Russ Heldman, Chancellor

No. M2004-02414-COA-R3-CV - Filed February 14, 2006

In 1997, an elderly gentleman executed a power of attorney appointing his only daughter as his attorney-in-fact. Shortly thereafter, the daughter began to withdraw funds from her father's accounts held at the bank. The father's mental and physical condition deteriorated to such a state that he had to be placed into a nursing home facility. The daughter subsequently entered into a transaction to convey her father's real property. Ultimately, the father was forced to seek assistance from TennCare to pay for his nursing home obligations. TennCare subsequently brought suit against the father seeking reimbursement of funds expended on his behalf. The probate court appointed a temporary guardian to represent the father's interest. The father's guardian brought suit against the bank, the buyers of his real estate, and the daughter seeking to rescind the land sale contract, recover the funds dissipated from his accounts, or to impose a constructive trust. The daughter was dismissed from the suit after she relinquished control of certain items purchased with the proceeds from these transactions to the guardian. As for the bank, the guardian took the position that the bank owed the father a fiduciary duty to protect his accounts from dissipation by the daughter. In regards to the buyers of the father's real property, the guardian contended that they had notice of a problem with the transaction due to the daughter's mental instability, the unreasonably low price paid by the buyers, the existence of a contingency clause in the contract, and the fact that the father was in a nursing home. The bank and the buyers moved for summary judgment, and the trial court granted both motions. We affirm.

Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Chancery Court Affirmed

ALAN E. HIGHERS, J., delivered the opinion of the court, in which W. FRANK CRAWFORD, P.J., W.S., and DAVID R. FARMER, J., joined.

Joseph D. Baugh, Franklin, Tennessee, for Appellant, Helen Sfikas Rogers

Scott C. Williams, Keli J. Stewart, Nashville, TN, for Appellee, First National Bank

Douglas Thompson Bates, III, Centerville, TN, for Appellees, Terry W. Christian and wife, Zelda E. Christian

OPINION

I.
FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Reuben Richards ("Richards") was a long-time resident of Hickman County, Tennessee, and he owned approximately 115 acres of real property located in that county. Richards and his wife, who is presently deceased, had one child together, Marilyn Cunningham ("Cunningham"), who resided in Davidson County, Tennessee. Due to his increasing age, Richards began to experience forgetfulness and a lack of mobility. He had been a customer of the First National Bank (the "Bank") in Centerville, Tennessee, for many years. In 1997, Richards approached Lorraine Bates ("Bates"), then president of the Bank, seeking her assistance with planning for his future care. As a result of their conversations, Bates prepared a power of attorney for Richards, and on April 1, 1997, Richards executed the power of attorney naming Cunningham as his attorney-in-fact. The power of attorney provided Cunningham with the general authority to handle matters related to Richards' person and property. Specifically, it provided as follows: "This Power of Attorney shall include but not be limited to the right to sign checks on my accounts, withdraw funds from my account, make deposits, sell stocks, bonds or other securities, sell my personal property or real estate and collect any money due me."

According to Cunningham, she has suffered from schizophrenia and bipolar disorder since the mid-1980s. Cunningham took medications for these disorders and was hospitalized on several occasions due to her mental illness. Following the execution of the power of attorney, Cunningham began to withdraw funds from Richards' accounts at the Bank. Cunningham asserted that she had difficulty dealing with the employees of the Bank when she was not taking her medication and would attempt to withdraw funds from Richards' accounts. Over time, Cunningham withdrew a sizeable amount of funds from Richards' accounts held at the Bank for her own personal use. In 2001, Richards' condition deteriorated to such a state that he could no longer live independently. He was ultimately diagnosed with Alzheimer's disease and other age related illnesses. As a result, he was admitted into a nursing home facility in Nashville, Tennessee. That same year, Cunningham sold the timber off of Richards' land.

In 2002, Cunningham contacted Anita Arnold ("Arnold"), a real estate agent, seeking help with selling Richards' real property. Arnold initially estimated the value of Richards' real property to be $164,666.67. Kathy Davis ("Davis"), another real estate agent, noticed the listing advertising Richards' land for sale. Terry and Zelda Christian (the "Christians" or, collectively with the Bank,

"Appellees") lived a short distance from Richards' property. Cognizant of the Christians' proximity to Richards' property, Davis contacted the Christians to inquire as to whether they may be interested in purchasing the land. At that time, Terry Christian served as the Assessor of Property for Hickman County. The Christians authorized Davis to offer $220,000.00 to Arnold for the purchase of the land. Cunningham, through Arnold, responded with a counteroffer of $230,000.00, which the Christians accepted. All negotiations for the sale of the real property were conducted by the parties' respective real estate agents. On June 29, 2002, Cunningham and the Christians entered into a land sale contract to consummate the transaction. The contract contained the following contingency: "Contingent upon seller Marilyn Cunningham POA for R.K. Richards being able to sell property due to nursing home or DHS provisions regarding R.K. Richards." The Bank agreed to provide the financing to enable the Christians to purchase the property. Before releasing the funds, however, the Bank hired its own appraiser to appraise the property, which resulted in an appraised value of $245,000.00. Further, the Bank's attorney felt that Richards' explicit assent to the transaction needed to be obtained through the execution of a second power of attorney.

Cunningham obtained what purports to be Richards' signature on a document entitled "Amendment to Power of Attorney," which was apparently drafted by the Bank's attorney, although no one from the Bank was present when the document was executed. The amendment specifically granted Cunningham the authority to convey Richards' real property to the Christians. The Bank eventually determined that the original power of attorney executed by Richards vested Cunningham with sufficient authority to convey the property. Accordingly, the sale took place, and Cunningham received the proceeds from the sale. Cunningham used the proceeds to purchase a home in Davidson County, Tennessee, and she bought two new vehicles, both of which she subsequently wrecked. Shortly after purchasing the property, the Christians subdivided the land and conveyed some of the lots to various individuals.

Ultimately, Richards' nursing home expenses proved to be more than he could bear financially, and he was forced to seek assistance from TennCare. The State of Tennessee eventually brought suit against Richards in the Probate Court of Davidson County seeking reimbursement of expenses paid on his behalf. In June of 2003, the probate court appointed attorney Helen S. Rogers ("Rogers" or "Appellant") as temporary guardian for Richards' estate. Rogers subsequently secured the services of an appraiser who opined that, had Richards' real property been sold at auction, it would have sold for between $225,000.00 and $675,000.00. On June 25, 2003, Cunningham, pursuant to an agreed order, voluntarily surrendered to Rogers the home and the two vehicles she purchased with proceeds from the sale of Richards' real property. On June 26, 2003, Rogers, in her capacity as temporary guardian for Richards' estate, filed suit against the Bank, the Christians, and Cunningham in the Chancery Court of Hickman County.

In her complaint, Rogers sought to rescind the land sale contract entered into between Cunningham and the Christians as fraudulently entered into or to impose a resulting or constructive trust on the proceeds of the sale. Rogers also asked the chancery court to enjoin the Christians from further disposing of the real property at issue, and she sought compensatory damages from the defendants for the harm caused by their allegedly wrongful conduct. Further, she sought to impose

a constructive trust on any proceeds from the withdrawals made by Cunningham from Richards' accounts held at the Bank. The Bank and the Christians subsequently answered Rogers' complaint by denying the allegations set forth therein. On August 4, 2003, the chancery court entered an order temporarily enjoining the Christians from further disposing of the real property they obtained from Cunningham. In the same order, the court ordered that, pursuant to an oral motion made by Rogers, Cunningham was to be dismissed from the lawsuit, presumably due to her surrender of all assets in her possession to Rogers.

On October 3, 2003, the Christians filed their motion for summary judgment asserting that no genuine issues of material fact existed to rebut the following facts: they were bona fide purchasers of the real property at issue, they paid a reasonable and fair price for the property, and Cunningham had authority to convey the property pursuant to the power of attorney executed by Richards. On October 7, 2003, the Bank filed its motion for summary judgment asserting that, pursuant to section 45-2-707 of the Tennessee Code, it was shielded from liability as a matter of law for any losses resulting from Cunningham's withdrawal of funds from Richards' accounts held at the Bank. Further, the Bank alleged that, as a matter of law, it was not liable for any alleged attempt to defraud Richards of his real property. Rogers was subsequently allowed to amend her complaint to allege that the Bank and the Christians had actual or constructive notice of Cunningham's mental state at the time of the events giving rise to the lawsuit. The Christians were subsequently allowed to amend their answer to deny any knowledge of Cunningham's mental infirmities.

Rogers subsequently filed a response to the motions for summary judgment filed by the Christians and the Bank, wherein she asserted that genuine issues of material fact existed as to the allegations set forth in her complaint. On December 9, 2003, Judge Timothy L. Easter, sitting as chancellor, entered an order finding, in relevant part, as follows:

> The April 1, 1997, power of attorney executed by Mr. Richards was a durable power of attorney. Additionally, Mr. Richards was competent at the time he signed the 1997 durable power of attorney.
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> Tennessee Code Annotated § 45-2-707, grants complete immunity from suits to banks or other lending institutions that comply with its provisions regarding powers of attorney. The statute's language is clear and unambiguous, and this Court gives effect to the statute according to the plain meaning of its terms.
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> The Court is satisfied that the transactions by Ms. Cunningham in her capacity as attorney-in-fact for Mr. Richards are within the range of activities afforded protection from liability by T.C.A. § 45-2-707. There exists no genuine issue as to material fact regarding proof that the Bank may have known that monies were being misappropriated by Ms. Cunningham. First National Bank reasonably relied on the 1997 power of attorney to allow Ms. Cunningham the right to withdraw funds from Mr. Richards' account

> and fulfilled its required duties to the depositor. The Bank cannot be held liable for Ms. Cunningham's subsequent misuse (if any) of those funds.
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> Defendant First National Bank is, therefore, entitled to summary judgment dismissing any claims against it pursuant to the 1997 power of attorney. . . .
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> To the extent that the Defendant First National Bank seeks summary judgment on claims asserted by the Plaintiff regarding the 2002 real estate transaction to the Christians, the Court finds that there exists material issues of fact rendering summary judgment inappropriate on those claims. The circumstances surrounding the creation of the amendment to the power of attorney in July of 2002 raises a genuine issue of material fact.
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> . . . .
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> After reviewing the evidence in the light most favorable to the Plaintiffs and drawing all reasonable inference in favor of the Plaintiffs, the Court finds that there are genuine issues of material facts relevant to the claims made by Plaintiffs as it relates to the real estate transaction involving the Plaintiffs and the Christians. The granting of summary judgment, therefore, to Defendants Christians on all issues is inappropriate.

Thereafter, the Christians and the Bank began to file cross-complaints against various individuals and entities.[1] At some point, Judge Russ Heldman, sitting as chancellor, obtained control of the case. On February 12, 2004, the Christians filed a motion pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure asking the chancery court to revisit its previous order and issue an order granting their motion for summary judgment.

On May 17, 2004, Judge Heldman issued an order granting the Christians' motion for summary judgment as to all claims filed against them by Rogers. In the same order, the court expressed its desire to reconsider the motion for summary judgment filed by the Bank, therefore, the court decided to continue its ruling on that motion. On June 22, 2004, the Bank filed a renewed motion for summary judgment. On September 7, 2004, Judge Heldman entered an order granting the Bank's renewed motion for summary judgment as to all claims lodged against it by Rogers. Thereafter, Rogers filed a timely notice of appeal to this Court presenting, as we perceive them, the following issues for our reivew:

1. Whether genuine issues of material fact exist so that the trial court erred in granting summary judgment to the Bank; and

[1] These cross-complaints were ultimately dismissed, and the propriety of the trial court's actions in dismissing these complaints is not at issue on appeal.

2. Whether genuine issues of material fact exist so that the trial court erred in granting summary judgment to the Christians.

For the reasons set forth more fully herein, we affirm the trial court's grant of summary judgment to the Appellees in this case.

II.
STANDARD OF REVIEW

In evaluating the trial court's grant of summary judgment to the Appellees in this case, this Court must employ the following standard of review:

> The standards for reviewing summary judgments on appeal are well settled. Summary judgments are proper in virtually any civil case that can be resolved on the basis of legal issues alone. *Fruge v. Doe*, 952 S.W.2d 408, 410 (Tenn. 1997); *Byrd v. Hall*, 847 S.W.2d 208, 210 (Tenn. 1993); *Church v. Perales*, 39 S.W.3d 149, 156 (Tenn. Ct. App. 2000). They are not, however, appropriate when genuine disputes regarding material facts exist. Tenn. R. Civ. P. 56.04. Thus, a summary judgment should be granted only when the undisputed facts, and the inferences reasonably drawn from the undisputed facts, support one conclusion — that the party seeking the summary judgment is entitled to a judgment as a matter of law. *Webber v. State Farm Mut. Auto. Ins. Co.*, 49 S.W.3d 265 (Tenn. 2001); *Brown v. Birman Managed Care, Inc.*, 42 S.W.3d 62, 66 (Tenn. 2001); *Goodloe v. State*, 36 S.W.3d 62, 65 (Tenn. 2001).
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> Summary judgments enjoy no presumption of correctness on appeal. *Scott v. Ashland Healthcare Ctr., Inc.*, 49 S.W.3d 281 (Tenn. 2001); *Penley v. Honda Motor Co.*, 31 S.W.3d 181, 183 (Tenn. 2000). Accordingly, appellate courts must make a fresh determination that the requirements of Tenn. R. Civ. P. 56 have been satisfied. *Hunter v. Brown*, 955 S.W.2d 49, 50-51 (Tenn. 1997); *Mason v. Seaton*, 942 S.W.2d 470, 472 (Tenn. 1997). We must consider the evidence in the light most favorable to the non-moving party, and we must resolve all inferences in the non-moving party's favor. *Doe v. HCA Health Servs., Inc.*, 46 S.W.3d 191, 196 (Tenn. 2001); *Memphis Hous. Auth. v. Thompson*, 38 S.W.3d 504, 507 (Tenn. 2001). When reviewing the evidence, we must determine first whether factual disputes exist. If a factual dispute exists, we must then determine whether the fact is material to the claim or defense upon which the summary judgment is predicated and whether the disputed fact creates a genuine issue for trial. *Byrd v. Hall*, 847

> S.W.2d at 214; *Rutherford v. Polar Tank Trailer, Inc.*, 978 S.W.2d 102, 104 (Tenn. Ct. App. 1998).
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> A party seeking summary judgment has the burden of demonstrating that its motion satisfies the requirements of Rule 56, including its entitlement to judgment as a matter of law. *Carvell v. Bottoms*, 900 S.W.2d 23, 25 (Tenn. 1995); *Jones v. City of Johnson City*, 917 S.W.2d 687, 689 (Tenn. Ct. App. 1995). When a party seeking summary judgment makes a properly supported motion, the burden shifts to the nonmoving party to set forth specific facts which must be resolved by the trier of fact. *Byrd*, 847 S.W.2d at 215.
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> This court's role in review of the grant of summary judgment is to review the record and determine whether the requirements of Tenn. R. Civ. P. 56 have been met. *Staples v. CBL & Assoc.*, 15 S.W.3d 83, 88 (Tenn. 2000). Our perspective is the same as that of the trial court. *Gonzales v. Alman Const. Co.*, 857 S.W.2d 42, 44-45 (Tenn. Ct. App. 1993).

Summers v. Cherokee Children & Family Servs., Inc., 112 S.W.3d 486, 507–08 (Tenn. Ct. App. 2002).

III.
DISCUSSION

A.
The Grant of Summary Judgment to the Bank

A durable power of attorney is defined as follows:

> A durable power of attorney is a power of attorney by which a principal designates another as the principal's attorney in fact in writing and the writing contains the words "This power of attorney shall not be affected by subsequent disability or incapacity of the principal," or "This power of attorney shall become effective upon the disability or incapacity of the principal," or similar words showing the intent of the principal that the authority conferred shall be exercisable, notwithstanding the principal's subsequent disability or incapacity.

Tenn. Code Ann. § 34-6-102 (2001). The power of attorney executed by Richards contains the following statement: "This power of attorney shall not be affected by subsequent disability or incapacity of the principal." The parties do not dispute that the power of attorney executed by Richards on April 1, 1997 constitutes a durable power of attorney. As such, a fiduciary relationship

existed between Cunningham, as attorney-in-fact, and Richards, as principal. ***Childress v. Currie***, 74 S.W.3d 324, 328–29 (Tenn. 2002); ***Stewart v. Sewell***, No. M2003-01031-COA-R3-CV, 2005 Tenn. App. LEXIS 222, at *20–21 (Tenn. Ct. App. Apr. 14, 2005) (perm. app. pending).

On appeal, Rogers argues that the trial court erred in granting summary judgment to the Bank because a genuine issue of material fact exists as to whether the Bank was in a fiduciary relationship with Richards by virtue of the fact that Bates drafted the 1997 power of attorney. Further, Rogers contends that, if the Bank is held to owe a such a duty, genuine issues of material fact exist as to whether the Bank breached its fiduciary duty by permitting Cunningham to withdraw funds from Richards' accounts at the Bank given her unstable mental condition. In support of its motion for summary judgment, the Bank supplied the affidavits of Bates and the Bank's current president, Billy McCoy. They stated that both Richards and Cunningham were competent on the day the 1997 power of attorney was executed and that they never had reason thereafter to suspect that Cunningham was acting improperly. In response, Rogers supplied the affidavit of Cunningham, wherein she stated the following: "I had several bad episodes in the past during some of my bad emotional cycles, especially when I was off my medication, in dealing with various people at the First National Bank." In addition, Rogers supplied the affidavit of Cunningham's daughter, Cynthia Upchurch, who stated that her mother had a long history of mental illness and that the Bank was aware of her mother's strange behavior.

We begin with the issue of whether a fiduciary relationship existed between the Bank and Richards so that the Bank owed Richards a duty to protect his accounts held at the Bank from dissipation. The trial court found that no such relationship existed as a matter of law. We agree.

Regarding a bank's liability for damages resulting from the actions of an attorney-in-fact under a power of attorney, the legislature has provided as follows:

> (a) A bank (which term, for the purposes of this section, also includes a "lessor" as defined in § 45-2-901(4)) may recognize the authority of a power of attorney authorizing in writing an attorney-in-fact to operate, in whole or in part, the account of a depositor, or to access a customer's safe deposit box, until the bank receives written notice of the revocation of this authority.
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> (b) Written notice of the death or adjudication of incompetency of such depositor or customer shall constitute written notice of revocation of the authority of the attorney-in-fact, *except where the provisions of the Uniform Durable Power of Attorney Act are applicable.* Until the bank receives written notice of adjudication of incompetency of the depositor, the bank's authority to recognize a power of attorney shall not be rendered ineffective by such incompetency, whether existing at the time the power of attorney is granted or at the time the bank acts upon it.

> (c) Notwithstanding that a bank has received written notice of revocation of the authority of such attorney-in-fact, it may, until ten (10) days after receipt of such notice, pay any item made, drawn, accepted or endorsed by such attorney-in-fact prior to such revocation; provided, that such item is otherwise properly payable.
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> (d) *No bank shall be liable for damages, penalty or tax by reason of any payment made or property withdrawn pursuant to this section*.

Tenn. Code Ann. § 45-2-707 (2000) (emphasis added). Rogers argues that the Bank cannot rely on this statute to shield itself from liability because, unlike the "ordinary situation" set forth in the statute, the Bank in the instant case undertook to draft the 1997 power of attorney and, in doing so, entered into a fiduciary relationship with Richards. Without citation to direct authority, Rogers further contends that, "if the bank becomes aware of a questionable situation such as in this case, it has a duty to protect its' [sic] customer's assets."

Rogers cites to numerous cases which, although factually dissimilar to the present case, she contends offer support for her position on appeal. ***See***, ***e.g.***, ***Waller, Lansden, Dortch, & Davis v. Haney***, 851 S.W.2d 131, 131–32 (Tenn. 1992) (discussing a retainer fee agreement between an attorney and client and stating the general proposition of law regarding a confidential relationship between the parties); ***Fed. Ins. Co. v. Arthur Anderson & Co.***, 816 S.W.2d 328, 330 (Tenn. 1991) (noting that the relationship between an accountant and his client is a fiduciary one similar to that between an attorney and client); ***Petty v. Privette***, 818 S.W.2d 743, 747 (Tenn. Ct. App. 1989) (stating the proposition that a business transaction between an attorney and client must be closely scrutinized for signs of abuse); ***Nicholas v. Wright***, 301 S.W.2d 540, 542 (Tenn. Ct. App. 1956) (recognizing the existence of a confidential relationship between a guardian and ward requiring strict scrutiny of such relationships). While we do not quarrel with the general propositions of law set forth in the aforementioned authorities, Rogers cites to no authority for the proposition that a bank owes a fiduciary duty to protect a customer's assets from depletion by the customer's duly selected attorney-in-fact.

The burden of proving the existence of a confidential relationship lies with the party claiming the existence of such a relationship. ***Childress v. Currie***, 74 S.W.3d 324, 328 (Tenn. 2002). "[T]he issue of whether or not a confidential relationship existed, if not admitted, [is] a question of fact." ***Matlock v. Simpson***, 902 S.W.2d 384, 385 (Tenn. 1995) (citations omitted). Regarding the creation of a confidential or fiduciary relationship, we have recently noted the following:

> Confidential relationships can assume a variety of forms and courts have been hesitant to precisely define a confidential relationship. *Robinson v. Robinson*, 517 S.W.2d 202, 206 (Tenn. Ct. App. 1974). In general terms, a confidential relationship is any relationship which gives a person dominion and control over another. *Kelly v. Allen*, 558 S.W.2d 845, 848 (Tenn. 1977); *Turner v.*

> *Leathers*, 191 Tenn. 292, 232 S.W.2d 269, 271 (Tenn. 1950); *Roberts v. Chase*, 25 Tenn. App. 636, 166 S.W.2d 641, 650 (Tenn. Ct. App. 1942). It is not merely a relationship of mutual trust and confidence, but rather a confidential relationship is one where confidence is placed by one in the other and the recipient of that confidence is the dominant personality, with ability, because of that confidence, to exercise dominion and control over the weaker or dominated party. *Iacometti v. Frassinelli*, 494 S.W.2d 496, 499 (Tenn. Ct. App. 1973). A confidential relationship is created when one person has dominion and control over another. *Childress v. Currie*, 74 S.W.3d 324, 328 (Tenn. 2002) (citation omitted). It is important to recognize that the mere existence of a confidential relationship is not a suspicious circumstance per se. The courts are concerned not with confidential relationships but with *the abuse of such relationships*. *Robinson v. Robinson*, 517 S.W.2d 202, 206 (Tenn. Ct. App. 1974). (emphasis added)[.]
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> The relations between family members and relatives are not, in and of themselves, confidential relationships. *Halle v. Summerfield*, 199 Tenn. 445, 287 S.W.2d 57, 62 (Tenn. Ct. App. 1983); *Harper v. Watkins*, 670 S.W.2d 611, 628 (Tenn. Ct. App. 1983). However, fiduciary relationships such as guardian and ward, attorney and client, and conservator and ward are. *Kelly v. Allen*, 558 S.W.2d 845, 848 (Tenn. 1977); *Parham v. Walker*, 568 S.W.2d 622, 625 (Tenn. Ct. App. 1978); *Roberts v. Chase*, 25 Tenn. App. 636, 166 S.W.2d 641, 650 (Tenn. Ct. App. 1942); *see also* 1 Pritchard on the Law of Wills and Administration of Estates §§ 132-137 (4th ed. 1983); *Mitchell v. Smith*, 779 S.W.2d 384, 388-389 (Tenn. Ct. App. 1989).

Stewart v. Sewell, No. M2003-01031-COA-R3-CV, 2005 Tenn. App. LEXIS 222, at *18–19 (Tenn. Ct. App. Apr. 14, 2005) (perm. app. pending); ***see also In re Estate of S.W. Brindley***, No. M1999-02224-COA-R3-CV, 2002 Tenn. App. LEXIS 567, at *42–43 (Tenn. Ct. App. Aug. 7, 2002) (no perm. app. filed).

The fiduciary powers of a banking institution are set forth in section 45-2-1001 *et seq*. of the Tennessee Code. This statutory scheme provides, in relevant part, as follows:

> (a) Unless otherwise expressly provided by statute, a bank acting as a fiduciary shall have, alone or with others, all of the rights, powers, privileges and immunities, and be subject to the same liabilities and duties as an individual fiduciary under like circumstances. Such fiduciary powers include, *but are not limited to*, the power to act as:

(1) Fiduciary as defined in § 35-2-102[2];
(2) Custodian of property;
(3) Agent or attorney-in-fact;
(4) Registrar or transfer agent of securities;
(5) Fiscal agent or any political entity, public body, corporation, unincorporated association or individual;
(6) Investment advisor;
(7) Insurer of titles to, mortgages on, and other interests in any real estate; and
(8) Guarantor of the payment of bonds owned by other persons.

Tenn. Code Ann. § 45-2-1002(a) (2000) (emphasis added). Generally, a bank/depositor relationship is treated as a debtor/creditor relationship. ***Wagner v. Citizens' Bank & Trust Co.***, 122 S.W. 245, 247 (Tenn. 1909); ***Macon County Livestock Market, Inc. v. Ky. State Bank, Inc.***, 724 S.W.2d 343, 349 (Tenn. Ct. App. 1986). "Thus, the bank acquires title to the money deposited, and becomes the depositor's debtor for the amount deposited . . . ." 9 C.J.S. ***Banks & Banking*** § 270 (1996). "Under Tennessee law, the debtor/creditor relationship does not constitute a fiduciary relationship." ***Wright v. C & S Family Credit, Inc.***, No. 01A01-9709-CH-00470, 1998 Tenn. App. LEXIS 261, at *6 (Tenn. Ct. App. Apr. 24, 1998) (citations omitted) (no perm. app. filed); ***accord*** 9 C.J.S. ***Banks & Banking*** § 248 (1996) ("Generally, there is no fiduciary or similar relationship, giving rise to a fiduciary or similar duty, between a bank and its customer, depositor, or borrower, or between the bank and another financial institution."). Accordingly, "Tennessee law generally does not impose

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[2] This provision is a part of the Uniform Fiduciaries Act, which provides as follows:

> (a) The provisions of this chapter are applicable to state and federal savings and loan associations and savings banks. In the event of a conflict between such provisions and the provisions of a law on the same subject relating specifically to state or federal savings and loan associations or savings banks, the provisions of the specific law shall be controlling.
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> (b) In any case not provided for in this chapter, the rules of law and equity, including the law merchant and those rules of law and equity relating to trusts, agency, negotiable instruments and banking, shall continue to apply.
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> (c) (1) *Knowledge on the part of the bank or savings institution of the existence of a fiduciary relationship or the terms of such relationship shall not impose any duty or liability on the bank or savings institution for any action of the fiduciary.*
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> (2) *A bank or savings institution has no duty to establish an account for a fiduciary or to limit transactions in an account so established unless, in its discretion, it contracts in writing with the fiduciary to establish or limit transactions with respect to such an account; provided, that this shall not preclude a court from temporarily enjoining or restraining the removal of funds from an existing account by a bank or savings institution over which the court exercises personal jurisdiction.*

Tenn. Code Ann. § 35-2-111 (2001) (emphasis added).

fiduciary or other special duties on banks with respect to their customers." ***First Tenn. Bank Nat'l Assoc. v. C.T. Resorts Co., Inc.***, No. 03A01-9503-CH-00102, 1995 Tenn. App. LEXIS 580, at *15 (Tenn. Ct. App. Aug. 30, 1995) (citations omitted) (no perm. app. filed); ***but see*** 9 C.J.S. ***Banks & Banking*** § 248 (1996) ("A bank may have a fiduciary or similar duty under special circumstances, and may sometimes have a duty to disclose information about a customer to a third party."); Annotation, *Existence of Fiduciary Relationship Between Bank and Depositor or Customer So As To Impose a Special Duty of Disclosure Upon Bank*, 70 A.L.R.3d 1344 (1976) (discussing those circumstances under which a bank, while not acting as an executor or trustee, may owe a fiduciary duty to a depositor, customer, or third party).

Clearly, if the Bank in the present case had been named trustee of Richards' funds, conservator over his person or property, or his attorney-in-fact under the power of attorney, the Bank would be in a fiduciary relationship with Richards and owe him the duties commensurate with that relationship. ***See***, ***e.g.***, ***Barry v. Hensley***, 98 S.W.2d 102, 104 (Tenn. 1936) (finding that a bank was clearly liable when its president, acting as administrator of an estate, misappropriated funds it received on behalf of the estate).

As Rogers correctly points out, this Court has previously held as follows:

> It seems to be the settled rule that where a bank and trust company, authorized to examine titles for its patrons, and to charge a fee for the service, that its liability is the same as that of an individual attorney. Under the laws of this State bank and trust companies, or trust companies, are authorized and empowered under their charters to act as trustees, guardians, administrators, and other fiduciary relations with the public; also to examine titles. In all such matters where a fiduciary relation is created by the nature of the transaction, the same obligation and responsibility to the customer is assumed by the trust company exercising this right and authority as an attorney for his client. *Renkert v. Title Guaranty Trust Company*, 102 Mo. App. 267, 76 S.W. 641.
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> The conclusion we reach is that a trust company that undertakes to render a service that involves legal skill, and in the handling of legal questions, involving advice in the handling of matters entrusted to it, occupies the same confidential relation with its customers that an attorney occupies to a client. This contemplates perfect frankness, and fair dealing.

Bank of Comm. & Trust Co. v. Dye, 1 Tenn. App. 486, 493–94 (Tenn. Ct. App. 1926). Based on this authority, we must conclude that, by undertaking to draft a power of attorney for Richards,

Bates, as president of the Bank, undertook to provide a service involving legal skill and, thereby, entered into a fiduciary relationship with Richards. Even so, the Bank cannot be held liable for Cunningham's dissipation of Richards' funds.

"An attorney who is employed to prepare legal documents has the duty to see that they are properly drawn." 7A C.J.S. ***Attorney & Client*** § 315 (2004). "Although an attorney is not an insurer of the documents he or she drafts, the attorney may breach a duty toward the client when, after undertaking to accomplish a specific result, the attorney then fails to comply with prescribed statutory formalities or to effectuate the intent of the parties." ***Id.*** "A person who is not licensed to practice law[3] is liable for damages *because of the improper preparation* of certain legal documents drawn on behalf of the plaintiff." ***Id.*** (emphasis added).

It is undisputed that the 1997 power of attorney drafted by Bates was effectively drawn and accomplished exactly what Richards intended for it to do. In her response to the statements of undisputed fact filed by the Bank with its motion for summary judgment, Rogers stated as follows:

> 2. On April 1, 1997, he granted a durable Power of Attorney to his daughter Mrs. Marilyn Cunningham ("Mrs. Cunningham") whereby she was authorized to handle all matters relating to his person, his personally, and his real estate. (See Attached Affidavit of Ms. Lorraine Bates; See Sworn Testimony of Ms. Cunningham page 50–51).
>
> RESPONSE: Undisputed for purposes of summary judgment.

At oral argument, counsel for Rogers conceded that Richards told Bates he wanted to empower Cunningham to handle his affairs. Further, there is nothing in the record before this Court to indicate that Bates suggested that Richards select Cunningham as his attorney-in-fact. The only argument subsequently put forth by Rogers regarding the validity of the 1997 power of attorney was that Richards was not competent to enter into the power of attorney.[4] In support of this position, Rogers

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[3] The 1997 power of attorney appears to be a pre-printed form in which the names of Richards as principal and Cunningham as attorney-in-fact are handwritten into the appropriate blanks. Bates notarized the document as a notary public, but there is no indication on the power of attorney or in the record before this Court demonstrating that Bates is a duly licensed attorney. Moreover, the record also establishes that Bates drafted a will for Richards and his wife, although that document is not at issue in the present case.

[4] Rogers has also indicated that Cunningham did not have the requisite mental capacity on the date the 1997 power of attorney was executed. As will be discussed more fully *infra*, "[a]ny person can be appointed to act on account of another and to affect the relations of that other by his conduct." RESTATEMENT (SECOND) AGENCY § 21 cmt. a (1958). "Thus, an infant, a married woman, or a person otherwise so incompetent that he cannot bind himself by a contract can bind one who appoints him to make a contract for him." ***Id.*** Insofar as Cunningham's mental capacity could be considered relevant to the validity of the power of attorney at issue, we find any argument relying on Cunningham's (continued...)

points to the deposition testimony of her expert, Dr. Robert S. Quinn, M.D., however, he stated as follows:

> Q. April of 1997, did you know Mr. Richards then?
> A. No.
> Q. Do you have any medical opinion about what his status as far as competency was in April of 1997?
> A. No.
> Q. Do you have any records of Mr. Richards that indicate his status in 1997?
> A. No.

When asked about Richards' competency on April 1, 1997, Cunningham testified in her deposition that Richards was "pretty good," and she did not indicate that he lacked the requisite capacity to enter into the power of attorney.

"The mental capacity required to execute a general durable power of attorney . . . equate[s] to the mental capacity required to enter into a contract." ***In re Armster***, No. M2000-00776-COA-R3-CV, 2001 Tenn. App. LEXIS 797, at *23 (Tenn. Ct. App. Oct. 25, 2001) (citations omitted) (no perm. app. filed); ***see also Rawlings v. John Hancock Mut. Life Ins. Co.***, 78 S.W.3d 291, 297 n.1 (Tenn. Ct. App. 2001) ("[T]o have an agency relationship under a power of attorney, the principal must have the capacity to contract."). The party attempting to set aside the durable power of attorney

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[4](...continued)
mental capacity on April 1, 1997 to be without merit.

It is true that Cunningham made the following statements in her affidavit:

> 3. I had several bad episodes in the past during some of my bad emotional cycles, especially when I was off of my medication, in dealing with various people at the First National Bank.
>
> 4. When I would act out, I would be very demanding, loud and angry if I did not receive what I wanted immediately. I did this at the Bank prior to and after I sold my father's home on Primm Springs Road and used the money to buy myself a home in Nashville, Tennessee.

Cunningham's daughter submitted her affidavit stating that Cunningham had a long history of mental illness. However, her daughter was not present on April 1, 1997 when the power of attorney was executed, and she simply made a broad statement concerning Cunningham's mental problems.

"Mere conclusory generalizations will not create a material factual dispute sufficient to prevent the trial court from granting a summary judgment." ***Davis v. Campbell***, 48 S.W.3d 741, 747 (Tenn. Ct. App. 2001) (citations omitted); ***see also Hale v. Lincoln County***, No. M2004-01963-COA-R3-CV, 2005 Tenn. App. LEXIS 771, at *20–21 (Tenn. Ct. App. Dec. 9, 2005); ***Lab. Corp. of Am. v. Lacy and Assocs.***, No. M2002-01837-COA-R3-CV, 2004 Tenn. App. LEXIS 72, at *14 (Tenn. Ct. App. Jan. 29, 2004). In order to establish a genuine factual dispute, the nonmoving party must "set forth *specific facts*, not legal conclusions, by using affidavits or the discovery materials listed in Rule 56.03." ***Byrd v. Hall***, 847 S.W.2d 208, 215 (Tenn. 1993) (emphasis added). Cunningham failed to offer any evidence, other than vague generalizations, tending to establish her level of mental competency on the date the 1997 power of attorney was executed.

on the ground that the principal lacked the mental capacity needed to execute the document bears the burden of proof, and "the proof must be clear, cogent, and convincing." ***In re Armster***, 2001 Tenn. App. LEXIS 797, at *24–25. From the aforementioned facts offered in response to the Bank's motion for summary judgment, Rogers is unable to carry her burden. Thus, any attempt to prove that the Bank did not properly perform its duty in drafting the power of attorney for Richards must fail. Stated differently, the Bank's fiduciary duty extended only to ensuring that it drafted the power of attorney in compliance with applicable law and Richards' stated goals, which it did.

In a final attempt to establish liability on the part of the Bank, Rogers cites to this Court the following general proposition of law:

> The dominant rule in Tennessee and elsewhere is that the existence of a confidential relationship, followed by a transaction wherein the dominant party receives a benefit from the other party, a presumption of undue influence arises, that may be rebutted only by clear and convincing evidence of the fairness of the transaction.

Matlock v. Simpson, 902 S.W.2d 384, 386 (Tenn. 1995) (citations omitted). As to the Bank, this legal proposition is inapplicable. Other than drafting the power of attorney, the Bank derived no direct benefit from the transaction. Insofar as Rogers seeks to impose liability for the dissipation of Richards' funds, such injuries are the direct result of Cunningham's breach of her fiduciary duty to Richards as his attorney-in-fact. ***See Childress v. Currie***, 74 S.W.3d 324, 328–29 (Tenn. 2002); ***Stewart v. Sewell***, No. M2003-01031-COA-R3-CV, 2005 Tenn. App. LEXIS 222, at *20–21 (Tenn. Ct. App. Apr. 14, 2005) (perm. app. pending); RESTATEMENT (SECOND) OF AGENCY §§ 402, 404 (1958). Because the Bank relied on a duly executed power of attorney in permitting Cunningham to withdraw the funds held in Richards' accounts at the Bank, it cannot be held liable as a matter of law. ***See*** Tenn. Code Ann. § 45-2-707(d) (2000). Accordingly, we affirm the trial court's grant of summary judgment to the Bank.

B.
Grant of Summary Judgment to the Christians

In her complaint, Rogers sought to set aside the conveyance of Richards' real property as fraudulently entered into and to have the property held in constructive trust or returned to Richards' estate. The Christians filed their motion for summary judgment asserting that no genuine issue of material fact existed to rebut the conclusion that they were bona fide purchasers paying a fair value for the property. Rogers subsequently amended her complaint to allege that the Christians were actually or constructively aware of Cunningham's mental instability at the time of the conveyance. As a result, the Christians amended their answer to deny this allegation. Judge Heldman subsequently entered an order granting the Christians' motion for summary judgment.

On appeal, Rogers contends that genuine issues of material fact remain as to whether the Christians are indeed bona fide purchasers. Specifically, she asserts that disputed issues of fact exist

as to (1) whether the Christians paid an unusually low price for the property, (2) whether they had knowledge of the contingency clause in the contract relating to the 1997 power of attorney, (3) whether they were aware of Cunningham's "fits" in the Bank, and (4) whether they knew Richards was in a nursing home at the time of the conveyance.

At the outset, it is helpful to precisely characterize the dispute between the parties. The Christians asserted that they were bona fide purchasers of Richards' real property. A bona fide purchaser is defined as follows: "One who buys something for value without notice of another's claim to the item or of any defects in the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims." BLACK'S LAW DICTIONARY 1249 (7th ed. 1999). The position of bona fide purchaser is usually asserted in cases where two individuals or entities have received a deed from one grantor and one grantee claims no notice of the other grantee's title. ***See***, ***e.g.***, ***Tyndall v. Holbert***, No. 02A01-9904-CH-00098, 1999 Tenn. App. LEXIS 847 (Tenn. Ct. App. Dec. 15, 1999) (no perm. app. filed); ***see also*** Tenn. Code Ann. § 66-26-101 *et seq.* (2004).

Apparently, the Christians and Rogers view this case as a dispute over who has superior title to the property, Richards or the Christians. This characterization overlooks the fact that Richards is the original grantor of the deed in this transaction by virtue of the 1997 power of attorney. We have previously held that, by executing a power of attorney, the principal creates a fiduciary relationship with his attorney-in-fact governed by the laws of agency. ***Stewart v. Sewell***, No. M2003-01031-COA-R3-CV, 2005 Tenn. App. LEXIS 222, at *14–15 (Tenn. Ct. App. Apr. 14, 2005) (perm. app. pending); ***In re Estate of Mullins***, No. E2002-02094-COA-R3-CV, 2003 Tenn. App. LEXIS 261, at *4–6 (Tenn. Ct. App. Apr. 3, 2003) (no perm. app. filed); ***Rawlings v. John Hancock Mut. Life Ins. Co.***, 78 S.W.3d 291, 297 n.1 (Tenn. Ct. App. 2002); ***Eaton v. Eaton***, 83 S.W.3d 131, 134–35 (Tenn. Ct. App. 2001). "One acting pursuant to a durable power of attorney must act in the principal's best interests and within the scope of authority granted by the statute and the principal." ***Eaton***, 83 S.W.3d at 134 (footnote omitted); ***see also Stewart***, 2005 Tenn. App. LEXIS 222, at *15. The 1997 power of attorney expressly authorized Cunningham to "sell my personal property or real estate."[5] ***See*** RESTATEMENT (SECOND) OF AGENCY § 26 (1958) (stating that "authority to do an act can be created by written or spoken words"); 2A C.J.S. ***Agency*** § 202 (2003) ("An agent possesses whatever power to sell real property the agency agreement directly and specifically bestows on him or her, provided that the agreement is executed in such a form and manner as may be required to render it operative."). Thus, "a principal is subject to liability upon a transaction conducted by his agent, whom he has authorized or apparently authorized to conduct it in the way in which it is conducted, as if he had personally entered into the transaction." RESTATEMENT (SECOND) OF AGENCY § 140 cmt. a (1958).

[5] Rogers makes no attempt to address directly the agency relationship created between Richards and Cunningham and its effect on the transaction at issue. As previously discussed, there exists no genuine issue of material fact as to whether the 1997 power of attorney was validly executed. Although Rogers attempted to demonstrate that Richards was not competent on the date he executed the 1997 power of attorney, we have previously stated that she failed to create a genuine issue of material fact regarding this issue. Moreover, Rogers makes no mention of whether Cunningham acted within her authority as agent when she attempted to convey the property to the Christians.

Having set the present dispute into its proper legal context, we now turn our attention to the arguments espoused by Rogers for invalidating the conveyance at issue. First, Rogers points to the fact that the land sale contract contained the following contingency: "Contingent upon seller Marilyn Cunningham POA for R.K. Richards being able to sell property due to nursing home or DHS provisions regarding R.K. Richards." This fact was apparently relied on by Rogers to convince the trial court, and now this Court, that Cunningham lacked the authority to sell the land. The express language in the contingency reveals that it relates to any interest the nursing home or the Tennessee Department of Human Services may have had in Richards' real property, presumably to pay for his expenses, and not Cunningham's overall authority to convey the property. While subsequent attempts were made by the Bank to secure a second power of attorney expressly authorizing Cunningham to sell the subject real property, the parties ultimately relied on the 1997 power of attorney as vesting Cunningham with sufficient authority to convey the property. As previously discussed, there is no genuine issue of material fact as to whether the 1997 power of attorney was validly executed. Thus, the Christians could reasonably rely on Cunningham's authority, as Richards' agent, to convey the property. ***See*** RESTATEMENT (SECOND) AGENCY § 140 cmt. a (1958) ("[A] principal is subject to liability upon a transaction conducted by his agent, whom he has authorized or apparently authorized to conduct it in the way in which it is conducted, as if he had personally entered into the transaction.").

Next, Rogers argues that genuine issues of material fact exist as to whether the Christians knew that Richards was in a nursing home facility at the time of the conveyance. This argument is made in an apparent attempt to demonstrate that Richards' mental status at the time of the transaction is somehow relevant to its validity. Any argument in this regard, however, must fail as a matter of law. As previously discussed, the 1997 power of attorney is a durable power of attorney. "All acts done by an attorney-in-fact pursuant to a durable power of attorney during any period of disability or incapacity of the principal have the same effect and inure to the benefit of and bind the principal and the principal's successor in interest as if the principal were competent and not disabled." Tenn. Code Ann. § 34-6-103 (2001). Thus, Cunningham had the power to act on behalf of Richards not only without his consent during those times when he was competent, but she also had the power to act on his behalf after he allegedly lost his mental competency. ***See Stewart***, 2005 Tenn. App. LEXIS 222, at *22–23; ***Eaton***, 83 S.W.3d at 134.

Third, Rogers apparently asserts that a genuine issue of material fact exists as to whether the price paid for the property was unusually low, thereby signaling to the Christians that a problem existed with the transaction. Rogers, other than pointing to this fact in her brief, makes no further explanation of the significance of this fact, nor does she cite to any legal authority to aid this Court in understanding the significance of this fact. Upon conducting our own independent research, we assume that Rogers relies on this fact in an attempt to argue that Cunningham breached her fiduciary duty as agent by selling the property for $230,000.00.

We have previously noted that circumstances may arise whereby a third party may be liable to a principal due to an agent's breach of a fiduciary duty, stating:

Section 314 of the *Restatement (Second) of Agency* states as follows:

> A person who receives the principal's property from an agent of another, with notice that the agent is thereby committing a breach of fiduciary duty to the principal, holds the property thus acquired as a constructive trustee, or at the election of the principal, is subject to liability for its value; one who receives such property, non-tortiously and without notice, but who is not a bona fide purchaser, is subject to liability to the extent to which he has been unjustly enriched.

Restatement (Second) of Agency § 314 (2000). Further, if a third person intentionally causes or assists an agent to violate their fiduciary duty to the principal, the third person is subject to liability in tort for any harm they have caused the principal or in a restitutional action for profit they derived from the transaction. 3 Am. Jur. 2d *Agency* § 299 (1986). Finally, a contract executed between the principal's agent and a third party is voidable at the option of the principal if collusion existed between the agent and the third party. *Hawkins v. Byrn*, 150 Tenn. 1, 261 S.W. 980, 982 (Tenn. 1924); 1 Tenn. Jur. *Agency* § 55 (2001).

Eaton, 83 S.W.3d at 135 (holding that the record did not support the conclusion that the seller and the agent of the incompetent principal conspired to defraud the principal, as the seller was unaware of how the agent would use the proceeds from the sale).

There is nothing in the record to indicate that the Christians had notice that Cunningham was breaching her fiduciary duty to Richards by offering the property for sale at $230,000.00 or that they intended to assist Cunningham in breaching her fiduciary duty. To the contrary, all of the facts demonstrate that the Christians paid a fair and reasonable price for the property. In support of their motion for summary judgment, the Christians submitted the affidavits of Arnold, Cunningham's real estate agent; Davis, the Christian's real estate agent; the Bank's appraiser; and Terry Christian. Arnold stated that she initially valued the property at $164,666.67 and went on to set forth the method she used to reach an asking price of $240,000.00. Davis stated that the original asking price was set by Cunningham and her agent and that the Christians ultimately agreed to Cunningham's counteroffer of $230,000.00. The Bank's independent appraiser stated that she was hired by the Bank to appraise the property and determined it to be worth $245,000.00 and that the $230,000.00 paid by the Christians fell within a reasonable range of the fair market value. As property assessor for Hickman County, Terry Christian stated that he used a state generated formula to arrive at a fair market value of $203,292.59. In response to the Christians' motion for summary judgment, Rogers submitted the affidavit of her own appraiser, who opined that, at auction, Richards' land would sale for between $225,000.00 and $675,000.00. However, Rogers' appraiser stated in his affidavit that

he conducted his appraisal after Rogers had been appointed to oversee Richards' estate and, therefore, after the Christians had expended funds improving and subdividing the property.

In any event, the affidavit of Rogers' appraiser fails to create a genuine issue of material fact as to whether this transaction was conducted at anything other than arms length. The original purchase price was set by Cunningham and her real estate agent, not by the Christians. All negotiations relating to the transaction were conducted by the respective real estate agents for the Christians and Cunningham. Further, all of the evidence establishes that the Christians paid an amount within the acceptable range of fair market value for the property. To be sure, the amount paid by the Christians falls within the range of acceptable fair market value set by Rogers' own appraiser.

Finally, we come to the crux of Rogers' position regarding this transaction on appeal. Rogers, without further argument or explanation, stated in her brief that a genuine issue of fact existed as to whether the Christians knew that Cunningham had "fits" in the Bank. We find nothing in the record to indicate that the Christians were present in the Bank on any occasion when Cunningham had "fits." In her reply brief, however, Rogers clarified her position to assert that her primary contention is that Cunningham was not competent when she entered into the contract with the Christians.

When evaluating such arguments, we generally adhere to the following principle of law:

> A deed is valid only if it is the product of the grantor's conscious, voluntary act. Thus, a deed is void if, at the time of its execution, the grantor was mentally unbalanced, without intelligent comprehension of the act being performed, and incapable of transacting. *See Bright v. Bright*, 729 S.W.2d 106, 109 (Tenn. Ct. App. 1986); *Brown v. Weik*, 725 S.W.2d 938, 944 (Tenn. Ct. App. 1983); *Hinton v. Robinson*, 51 Tenn. App. 1, 9, 364 S.W.2d 97, 100 (1962). A party seeking to rescind a conveyance because of mental incapacity has the burden of proof. *See Williamson v. Upchurch*, 768 S.W.2d 265, 269 (Tenn. Ct. App. 1988).

Fell v. Rambo, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000). In the present case, however, we must review the transaction at issue in light of the agency relationship created by the 1997 power of attorney.

While a principal must have the requisite mental capacity to enter into a power of attorney, ***Rawlings v. John Hancock Mut. Life Ins. Co.***, 78 S.W.3d 291, 297 n.1 (Tenn. Ct. App. 2001), "[a]ny person has capacity to hold a power to act on behalf of another," RESTATEMENT (SECOND) OF AGENCY § 21(1) (1958). The comments to the general rule set forth in the Restatement provide as follows:

> Capacity to have rights or be subject to duties and liabilities is not necessary. Thus, an infant, a married woman, or a person otherwise so incompetent that he cannot bind himself by a contract can bind one who appoints him to make a contract for him. *One whom a court has adjudged mentally incompetent but who retains volition, or one who has been deprived of civil rights, has power to affect the principal as fully as if he had complete capacity*.

RESTATEMENT (SECOND) OF AGENCY § 21 cmt. a (1958) (emphasis added). "[T]he principal ordinarily cannot complain of the lack of mental capacity of one whom he or she has chosen to represent him or her." 2A C.J.S. ***Agency*** § 26 (2003). In the event a principal appoints an incompetent agent, his recourse, if any, is generally against his agent. ***See*** RESTATEMENT (SECOND) OF AGENCY §§ 21, 399, 402, 410 (1958).

Even if Cunningham's mental capacity was a factor to be examined when evaluating the overall validity of the transaction with the Christians, Rogers has failed to establish a genuine issue of material fact regarding Cunningham's mental capacity at the time of the conveyance. In support of their motion for summary judgment, the Christians submitted their own affidavits stating that they had no knowledge of Cunningham's mental status on the date of the transaction. In response, Rogers submitted the affidavits of Cunningham and Cunningham's daughter. In her affidavit, Cunningham stated that, around the time she sold Richards' real property, she was "very confused" and "could not deal with the stress of moving and wrecking an automobile." Cunningham's daughter asserted in her affidavit that her mother has a long history of mental illness and further stated as follows:

> I also believe from conversations that I had with a gentleman, I think was Terry Christian, and Ed Yeargan (who bought the main house from Mr. Christian), in the Fall of 2002 that they were well aware of my mother's poor mental health and deteriorated condition. On the day that my mother was moving out of the Primm Springs Road property in Hickman County, Mr. Yeargan and Mr. Christian were there. These men and my husband, Terry Upchurch, had a conversation about the "problems" my mother was having. I was present for that conversation. My husband and I apologized for my mother's rudeness and poor verbal behavior on the day of the move. Mr. Yeargan or Mr. Christian told us that this was okay, that they had suspected for some time that Marilyn was having problems, and that he was an understanding Christian man and knew that it was difficult for us to get her to move out. My mother had delayed moving out of the Primm Springs Road house until the last minute and Mr. Yeargan had made threats that he was going to charge her rent. . . . However, given her mental state, he did not do this.

These statements were the only ones offered by Rogers in an effort to create a genuine issue of material fact as to Cunningham's mental state on the date of the transaction at issue.

"A party seeking to rescind a conveyance because of mental incapacity has the burden of proof." ***Fell v. Rambo***, 36 S.W.3d 837, 846 (Tenn. Ct. App. 2000). Regarding the capacity needed to enter into a contract, we have stated as follows:

> The degree of mental capacity required to enter into a contract is a question of law. *Nashville, Chattanooga & St. Louis R.R. v. Brundige*, 114 Tenn. 31, 34, 84 S.W. 805, 805 (1905). Competency to contract does not require an ability to act with judgment and discretion. *In re Ellis*, 822 S.W.2d 602, 607 (Tenn. Ct. App. 1991). All that is required is that the contracting party reasonably knew and understood the nature, extent, character, and effect of the transaction. *Mays v. Prewett*, 98 Tenn. 474, 478, 40 S.W. 483, 484-85 (1897); *In re Estate of Holmes*, 1998 Tenn. App. LEXIS 213, No. 02A01- 9707-PB-00158, 1998 WL 134333, at *3 (Tenn. Ct. App. Mar. 26, 1998) (No Tenn. R. App. P. 11 application filed); *Roberts v. Roberts*, 827 S.W.2d 788, 791-92 (Tenn. Ct. App. 1991). Thus, persons will be excused from their contractual obligations on the ground of incompetency only when (1) they are unable to understand in a reasonable manner the nature and consequences of the transaction or (2) when they are unable to act in a reasonable manner in relation to the transaction, and the other party has reason to know of their condition. Restatement (Second) of Contracts § 15(1) (1981).
>
> All adults are presumed to be competent enough to enter into contracts. *Uckele v. Jewett*, 642 A.2d 119, 122 (D.C. 1994); *Foltz v. Wert*, 103 Ind. 404, 2 N.E. 950, 953 (Ind. 1885). Accordingly, persons seeking to invalidate a contract for mental incapacity have the burden of proving that one or both of the contracting parties were mentally incompetent when the contract was formed. *Knight v. Lancaster*, 988 S.W.2d 172, 177-78 (Tenn. Ct. App. 1998); *Williamson v. Upchurch*, 768 S.W.2d 265, 269 (Tenn. Ct. App. 1988). It is not enough to prove that a person was depressed or had senile dementia. To prove mental incapacity, the person with the burden of proof must establish, in light of all the surrounding facts and circumstances, that the cognitive impairment or disease rendered the contracting party incompetent to engage in the transaction at issue according to the standards set forth above. *Butler v. Harrison*, 578 A.2d 1098, 1101 (D.C. 1990); *Weakley v. Weakley*, 355 Mo. 882, 198 S.W.2d 699, 702-03 (Mo. 1947); *see also Woods v. Mutual of Omaha*, 1996 Tenn. App. LEXIS 644, No. 02 A01-9510-CV-00218, 1996 WL 578489, at *3 (Tenn. Ct. App. Oct. 9, 1996), *perm. app. denied* (Tenn. 1997)

(rejecting an affidavit that did not address the party's competency regarding the specific contract at issue).

Rawlings v. John Hancock Mut. Life Ins. Co., 78 S.W.3d 291, 297 (Tenn. Ct. App. 2001) (footnotes omitted). In order to set aside a deed, "the proof must be clear, cogent, and convincing." ***Myers v. Myers***, 891 S.W.2d 216, 219 (Tenn. Ct. App. 1994); ***see also Pugh v. Burton***, 166 S.W.2d 624, 627 (Tenn. Ct. App. 1942). When evaluating one's competency to enter into a contract, we are primarily concerned with the party's capacity at the time of contracting. ***See Harper v. Watkins***, 670 S.W.2d 611, 628–29 (Tenn. Ct. App. 1983). There must be material, substantial, and relevant evidence to show a lack of mental capacity at the time of contracting, otherwise there is no issue for a trier of fact to decide. ***Hammond v. Union Planters Nat'l Bank***, 222 S.W.2d 377, 380 (Tenn. 1949).

Cunningham has merely stated that she was "very confused" and "under stress" around the time of the transaction with the Christians. Cunningham's daughter stated in general terms that the Christians knew that her mother was "having problems," and, in support of this assertion, she recounts a conversation which took place *after* the transaction at issue. As we have previously noted, these vague, conclusory generalizations cannot be relied upon to create a genuine issue of material fact. ***Davis v. Campbell***, 48 S.W.3d 741, 747 (Tenn. Ct. App. 2001) ("Mere conclusory generalizations will not create a material factual dispute sufficient to prevent the trial court from granting a summary judgment."); ***accord Hale v. Lincoln County***, No. M2004-01963-COA-R3-CV, 2005 Tenn. App. LEXIS 771, at *20–21 (Tenn. Ct. App. Dec. 9, 2005); ***Lab. Corp. of Am. v. Lacy & Assocs.***, No. M2002-01837-COA-R3-CV, 2004 Tenn. App. LEXIS 72, at *14 (Tenn. Ct. App. Jan. 29, 2004). Instead, the party opposing a motion for summary judgment must "set forth specific facts, not legal conclusions" to demonstrate that a genuine issue of material fact exists. ***Byrd v. Hall***, 847 S.W.2d 208, 215 (Tenn. 1993). Having failed to create a genuine issue of material fact as to her mental capacity on the date of the transaction with the Christians, the trial court was correct to grant summary judgment to the Christians in this case.

IV.
CONCLUSION

For the aforementioned reasons, we affirm the trial court's grant of summary judgment to the Appellees, First National Bank, Terry W. Christian, and Zelda E. Christian. Costs of this appeal are to be taxed to the Appellant, Helen S. Rogers, temporary guardian for the Estate of Reuben K. Richards, and her surety, for which execution may issue if necessary.

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ALAN E. HIGHERS, JUDGE